Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-21166

WILLIE E. PRATT, and

BERNARD GARRETT
Plaintiffs-Appellants,

versus

THE CITY OF HOUSTON TEXAS
Defendant-Appellee.

Appeal from the United States District Court for the

Southern District of Texas, Houston

Apendix A

April 19, 2001

Before JOLLY, JONES and SMITH. Circuit Judges

E. GRADY JOLLY, Circuit Judge:

The plaintiffs, two community service inspectors for the City of Houston's Department of Public works and Engineering, appeal the district court's grant of summary judgment in favor of the city of Houston on their Title VII and 42 U.S.C. § 1981 race discrimination claims. Because we find that there is sufficient evidence to infer that race was a factor in the City's failure to promote either Pratt or Garrett, we reverse the grant of summary judgment by the district court.

I

In 1997, Willie Pratt and Bernard Garrett, both black men, were community service inspectors for the City of Houston's Department of Public Works and

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Engineering ("DPWE"). In July of 1997, DPWE posted a job opening for a senior inspector. The posting listed the position's minimum qualifications as (1) an associate's degree or certification/licensing in a technical specialty program of between eighteen months and three years' duration; (2) four years of experience investigating or inspecting criminal environmental pollution; (3) a valid Texas driver's license and compliance with the City's policy on driving. The posting also Listed a preference for experience in criminal case development and environmental investigations. Under "Selections/Skill Test Required, the posting stated 'none.

Tom Collins, the chief inspector of the Neighborhood Protection Division of DPWE,

supervised both Pratt and Garrett, and was responsible for selecting the new senior inspector. Most of the plaintiffs' claims of discrimination center on the allegation that Collins preferred white candidates and that he had decided to hire the white male who was eventually awarded the position before the hiring process even began. Pratt and Garrett point to Collins's attempt to lower the minimum qualifications for the senior investigator position before the opening was posted Although there is no evidence indicating what qualifications Collins tried to change, the plaintiffs assert that Collins was attempting to make a white candidate eligible for the position. The position's requirements were not changed, however, as the basic qualifications were standard city-wide and Collins had

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no authority to change them.

Pratt and Garrett both applied for the senior inspector position. Their qualifications exceeded the minimum requirements for the position. Pratt had a B.S. degree arid a year of graduate school, two and a half years of experience a pollution investigator for the Coast Guard, and had been a DPWE community service inspector for' the prior two years. Garrett had a Master's degree and a Ph.D. (pending submission of his dissertation) in environmental engineering and had spent the previous four years as a community service inspector at DPWE.

In total, twenty-four people -- twelve blacks, seven whites, two Hispanics and two Pacific Islanders -- applied for the senior inspector position. A human resources specialist, Sally Layman, screened the

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applications for minimum requirements, and forwarded fifteen of them to Collins at **DPWE,** to conduct the primary interviewing, of the fifteen forwarded applications, eight applicants were black, four were white, two were Hispanic, and one was Pacific Islander.

Garrett's application was forwarded; Pratt's application was not. Layman contends that she did not forward Pratt's application because she did not know the subject area of Pratt's degree. Pratt contends that he attached his resume with his application, and that Layman knew he had a degree and knew that he was an employee of the department. After Pratt became aware that he had not been referred, he called the human resources department and orally provided the

information. At that point, however, the application period had closed. Pratt also states that he informed Collins of his application and credentials. Collins did not inquire into the status of Pratt's application. The application of another black candidate, Marion Gale, also was not initially forwarded. Gale inquired personally about the status of his application, which was then forwarded to Collins. Although Collins says that he checked on Gale's application, that point is disputed.

The application of Edward Rutland, the individual who was eventually awarded the position, also was not forwarded. Rutland had completed twelve hours of college in addition to his high school diploma, had graduated from the Houston Police

Academy, had forty hours of **EPA** hazardous waste operations training and had spent two of his twelve years as a Houston police officer in a Rat on a Rat" program enforcing environmental laws. Rutland had been out of the police force for two years when he applied for the senior inspector position; he had not engaged in related work during the period. Neither was it clear that Rutland's educational background and his work experience met the minimum qualifications listed for the position.

When Layman failed to forward Rutland's application, several city employees, including Collins and Beatrice Link, Collins's supervisor, made inquiries on Rutland's behalf. The human resources department reviewed Rutland's application again and

determined that the combination of the forty hour course and Rutland's experience as a police officer satisfied the education and experience requirements. Layman therefore forwarded Rutland's application to the second stage.

After Layman referred the applications, Collins conducted preliminary interviews with the candidates. Collins administered a computer skills exam testing grammar, knowledge of environmental laws, and Microsoft word Skills to all the interviewees. Collins did not give applicants official notice that the computer test would be part of the selection process.

Garrett interviewed for the Senior Inspector position. Many of the facts concerning the interview

are in dispute. Collins asserts that Garrett was late for the interview. When Garrett arrived, Collins was not in his office; he was speaking to a colleague in the next door office. According to Garrett, Collins saw him but ignored him. While waiting for his interview, Garrett went to the drinking fountain, approximately fifteen feet away. In the meantime, believing that Garrett had left the building, Collins had Garrett paged. Garrett appeared at Collins's door immediately after the page. Collins then requested that Garrett complete the skills test. Garrett protested that a skills test had not been listed on the posting. Collins claims that Garrett then became angry and stormed out; Garrett contends that Collins became irate and began yelling at him, and that he left without taking the test

to defuse the situation.

Collins referred three candidates, including Gale, for final interviews with a three person panel. Garrett was not a finalist. The panel, of which Collins was a member, recommended Rutland to Link. Link considered the recommendation, and then recommended Rutland to the personnel department.

The plaintiffs argue that there is other evidence that Collins attempted to manipulate the hiring process to favor white candidates. Previously, Collins had canceled another senior inspector posting after looking at a list of qualified applicants, on which, the plaintiffs contend, all individuals, including Garrett, were black. Garrett and Pratt assert that Collins canceled the posting after Human

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Resources refused to refer an under-qualified white candidate whom Collins preferred.

Pratt and Garrett filed this law suit against the City, claiming violations of Title **VII,** 42 U.S.C. § 1981, 42 U.S.C. § 1983, the Equal Protection Clause, and the Texas Commission on Human Rights Act. The district court granted summary judgment to the City in November 1999, holding that the plaintiffs did not create a material issue of fact as to whether race motivated the City's hiring decision. The plaintiffs appeal only their employment discrimination claims under Title **VII** and § 1981.

II

This court reviews the grant of summary judgment de novo, applying the same standard as the district court.

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Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000). "Summary judgment is proper when the evidence, viewed in the light most favorable to the non-movant, reflects no genuine issues of material fact." Rubinstein v. Administrators of the Tulane Educational Fund, 218 F.3d 392, 399 (5th Cir. 2000), cert. denied, 69 U.S.L.W. 3366 (U.S. Mar. 19, 2001)(No. 00-996). On a motion for summary judgment, a court reviews the facts in the light most favorable to the non-movant. Walker, 214 F.3d at 624.

To survive a motion for summary judgment, a Title VII [(1)] Plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411

U.S. 792, 802—04, 93 S.Ct. 1817 (1973). The City does not dispute that both Pratt and Garrett made a prima facie case of discrimination. (2) Once this prima fade case has been established, there is a presumption of discrimination, and the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the challenged employment action. McDonnell Douglas, 411 U.S. at 802-04. If such a showing is made, the burden shifts back to the plaintiff to demonstrate that the articulated reason was merely a pretext for discrimination. Id.

After a Title VII case reaches the pretext stage, the question for summary judgment is whether a rational fact finder could find that the employer discriminated against the plaintiffs on the basis of race. See St.

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Mary's Honor Ctr. v. Hicks, *509* U.S. 502, 511, 113 S.Ct. 2742 (1993). "A prima facie case and sufficient evidence to reject the employer's explanation" may permit a trier of fact to determine that an employer unlawfully discriminated, and may therefore be enough to prevent summary judgment. Reeves v. Sanderson Plumbing Products, *530* U.S. *133,* 148, 120 S.Ct. 2097 (2000). This showing, however, is not always enough to prevent summary judgment in favor of the employer. For instance, an employer would be entitled to summary judgment "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred" Id. Whether summary

judgment is appropriate in any particular case depends on a variety of factors, including "the strength of the prima facie case, the probative value of the proof that the employer's explanation is false and any other evidence that supports the employer's case and that properly may be considered." Id. [3] We have said that summary judgment is inappropriate "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which plaintiff complains." Vadie v. Mississippi State University, 218 F.3d *365,* 373 (5th Cir. 2000), cert. denied, 121 S.Ct. 1092 (2001).

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Both Pratt and Garrett established a prima facie case, and both plaintiffs were facially more qualified for the position than the white applicant who was hired. The City asserts a racially non-discriminatory reason for the failure to promote either Pratt or Garrett: Neither candidate completed the hiring process. However, both Pratt and Garrett introduced evidence that the City did not give them the opportunity to complete the hiring process. This evidence creates significant fact issues with regard to the City's motivation for not promoting the plaintiffs. Given these facts, the better resumes of the plaintiffs, the special treatment Rutland received, and the allegations that Collins discriminated in favor of white applicants on other occasions, a jury could

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reasonably infer that the hiring process was manipulated, and that it was pre-ordained that the white candidate would be awarded the position over demonstrably better credentialed blacks. Under these facts, it is for the jury to further decide the ultimate question of whether the City of Houston denied either one of these plaintiffs the promotion because of their race. We therefore reverse the district court's grant of summary judgment in favor of the City.(4)

III

Because we conclude that the evidence as a whole creates a question of fact with regard to the motivation behind the City's failure to promote Garrett and Pratt, and we find that a jury could infer discrimination based on race, we REVERSE the

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district court's grant of summary judgment to the City, and REMAND for further proceedings not inconsistent with this opinion.

REV E R S E D and REMANDED.

1. The elements of the claims under Title VII and 42 U.S.C § 1981 are identical. Casarez v. Burlington Northern/Santa Fe Co., 193 F.3d 334, 337 n.3 (5th Cir. 1999). we therefore evaluate both claims using the same analysis.2. For a prima facie case of race discrimination, a plaintiff must prove that (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was not promoted; and (4) either the position was filled by someone not in the protected class, or the person was not

promoted because of his race. see Rutherford v. Harris County. Texas, 197 F.3d 173, 179 (5th Cir. 1999); Shackelfnrd V.. Deioitte & Touche, 190 F.3d 398, 404 (5th Cir. 1999). Because both Pratt and Garrett are black, fit the minimum qualifications for the position, and were not promoted to a position eventually filled by a white candidate, there is no question that they established a prima facie case of discrimination.

3. Although Reeves was based on a motion for judgment as a matter of law, the standard is the same.

4. We recognize that, even if there is a finding of prohibited discrimination, a remedy in this case may be problematic in that only one position was available, and Pratt and Garrett were not the only other

applicants. We make no comment on this; we simply note the problem and leave it to the district court to resolve in the course of further proceedings. See Arnold v. United States Dept. of the Interior, 213 F.3d 193, 196 (5th Cir. 2000)("among multiple job applicants who fail to secure the position because of discrimination, only those who can prove that they would have gotten the position but for the discrimination can recover compensatory damages."), cert. denied, 121 S.Ct. 1080 (2001).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ENTERED
MAR 06 2002

WILLIE E. PRATT and BERNARD **GARRETT,**	§	**Michael** N. Milby, clerk of court
Plaintiffs	§	
v.	§	CIVIL ACTION
	§	NO.H-98-3587
CITY OF HOUSTON,	§	
Defendant.	§	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

A. Findings of Fact

After considering the evidence and the arguments of counsel the court finds that the preponderance of the credible evidence establishes the following facts:

1. Willie E. Pratt and Bernard Garrett are black males.

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2. Both Willie F. Pratt and Bernard Garrett applied for a single Senior Inspector position in the environmental enforcement unit (also sometimes known as the "Rat on a Rat" program) of the Neighborhood Protection Division of the Department of Public Works and Engineering of the City of Houston pursuant to Job Posting PN #62388.

3. The environmental enforcement unit investigates and assists in the prosecution of environmental crimes committed within the City of Houston. The unit includes both civilian employees and Houston Police Department officers.

4. The minimum educational requirements for the Senior Inspector position was "[a]n Associate's

degree or certification/licensing in a technical specialty program of over eighteen months and up to 3 years duration . . ." The minimum experience requirements was four years experience in the investigation or inspection of criminal environmental pollution.

5. Job Posting PN #62388 stated that a preference would be given to individuals with experience in standard procedures for criminal case development and experience in environmental investigations.

6. Applications for the Senior Inspector position were submitted to and reviewed by the Human Resources Department. If the Human Resources Department determined that an applicant met

the criteria for the position, his application was referred to the Public Works Department for consideration.

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7. Pratt's application was not referred to the Public Works Department from the Human Resources Department because Sally Layman, in her capacity as Senior Human Resources Specialist of the Selection Services Division, determined that Pratt did not meet the minimum educational qualifications for the position. Layman, a white female, could not determine Pratt's degree discipline from his application, and without a stated discipline she could not determine Pratt's qualifications for the position. Layman also reviewed the application of Ed Rutland, a white male, for the Senior Inspector position. Layman did not refer Rutland's application because she concluded he did not meet the education and experience requirements for the Senior Inspector position. Human Resources then

referred the applications of Rutland and Gale to Public Works for consideration. Newman's decision was not affected by the race of the applicants.

8. Although Layman's decision not to refer Pratt's application to the Public Works Department appears to be questionable since the Job Posting for PN #62388 did not require a degree in a particular discipline, Layman's decision was not affected by Pratt's race.

9. After the initial review of applicants by the Human Resources Department and the referral of the successfully evaluated applicants to the Public Works Department, Tom Collins, a white male and the Chief Inspector of the environmental enforcement unit, told Beatrice Link, a black female and the Deputy Director of the Neighborhood Protection Division, that he was

concerned that Human Resources had not referred the applications of Ed Rutland and Marion Gale, a black male. Rutland, a former Houston police officer, had helped Collins set up the environmental enforcement unit; and Collins encouraged Rutland to apply for the Senior Inspector position and believed that Rutland was the most qualified applicant. Link then called the Human Resources Department. The Administrative Manager of the Human Resources Selective Services Division, Rod Newman, a black male, reviewed Rutland's application and determined that he met the qualifications for the Senior inspector position. Newman concluded that Rutland's work experience as a twelve-year veteran of the Police Department and two-year veteran of the environmental enforcement unit

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satisfied the education requirements for the Senior Inspector position. Human Resources then referred the applications of Rutland and Gale to Public Works for consideration. Newman's decision was not affected by the race of the applicants.

10. Of the 24 applicants who applied for the Senior Inspector position, the Human Resources Department referred the applications of 17 people to the Public Works Department. Of those referred to the Public Works Department, seven were black, three were white, and one was Hispanic. See Defendant's Exhibit 53. (No evidence was presented as to the race of the other applicants who were referred.) One of the applicants who was referred to the Public Works Department was Bernard Garrett.

10. Appendix B

11. The Public Works Department's selection process for PN #62388 involved a two-phase procedure.

12. The first phase of the selection process required each applicant to complete a computer assessment exercise supervised by Collins.

13. On or about October 15, 1997, Garrett was scheduled for the first phase interview with Collins for the Senior Inspector position.

14. Like all of the other applicants, Collins told Garrett that he was to complete a computer assessment exercise. Garrett refused to perform the computer assessment exercise and walked out of Collins' office.

15. The computer assessment exercise bore a direct

and reasonable relationship to the type of work required and expected to be performed by a Senior Inspector.

16. Collins' request that all applicants perform the computer assessment exercise did not violate any established policy, rule, or regulation of the City of Houston, and had nothing to do with the race of the applicants.

17. Garrett, by his actions in not taking the computer assessment exercise and walking out of Collins' office, removed himself from the selection process for the Senior Inspector position.

18. Before this incident, Garrett had received three promotions and had always received excellent evaluations by Collins.

19. Applicants who successfully completed the

first phase of the process were then interviewed by a selection panel. The three applicants who successfully completed the first phase and were interviewed by the panel were Don Montgomery, a black male, Marion Gale, a black male, and Ed Rutland, a white male.

20. After completing the interviews, the selection panel gave Rutland and Gale the highest evaluations. The ultimate decision of whom to select for the Senior Inspector position was made by the Deputy Director of the Neighborhood Protection Division, Beatrice Link. Collins recommended to Link that Rutland receive the position. Neither the panel's decision nor Collins' recommendation was affected by the race of the applicants.

21. Link, who was a member of the selection

panel, reviewed the applications of the three finalists and reviewed the personnel files of Gale and Montgomery. Link spoke with an assistant police chief about Rutland and was told that Rutland was one of his better workers and was dedicated to the job. Link then selected Rutland to fill the Senior Inspector position. Link's decision was not affected by Rutland's race.

B. Conclusions of Law

The function of the court, as the trier of fact, is not to scrutinize the City of Houston's judgment as to which applicant f or the Senior Inspector position was best qualified. Courts do not sit as appeals panels over employers' promotion decisions. Whether the employer's decision was the correct one, or even a fair

one, is not the issue for the court; the sole issue is whether the employer's decision was motivated by racial discrimination. See Deines v. Texas Department of Protective & Regulatory Services, 164 F.3d 277, 281 (5th Cir. 1999) . In this case the court concludes, based on the findings of fact stated above, that neither plaintiff has shown that the City's failure to promote him to the Senior Inspector position, the failure to approve Pratt as qualified for the position, or the requirement that Garrett take a computer assessment exercise, was motivated by the race of Garrett or Pratt. Accordingly, the court makes the following conclusions of law:

1. Willie E. Pratt has not established by a preponderance of the evidence that the City of Houston

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failed to promote him because of his race.

2. Willie E. Pratt has not established by a preponderance of the evidence that the City of Houston discriminated against him because of his race.

3. Bernard Garrett has not established by a preponderance of the evidence that the City of Houston failed to promote him because of his race.

4. Bernard Garrett has not established by a preponderance of the evidence that the City of Houston discriminated against him because of his race.

5. Neither Willie E. Pratt nor Bernard Garrett is entitled to any relief under Title VII of the Civil Rights Act of 1964.

If any finding of fact should more properly be

characterized as a conclusion of law, it is hereby adopted as a conclusion of law. If any conclusion of law should more properly be characterized as a finding of fact, it is hereby adopted as a finding of fact.

SIGNED at Houston, Texas, on this 5th day of March, 2002.

SIM LAKE

UNITED STATES DISTRICT JUDGE

Appendix C

In The
United States Court of Appeals
Fifth Circuit

FILED
April 15, 2003

Charles R. Fulbruge III
Clerk

No. 02-20354

WILLIE E. PRATT
AND
BERNARD GARRETT,

Plaintiffs-Appellants,

VERSUS

CITY OF HOUSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
No. H-98-CV-3587

Before SMITH, WIENER, and BARKSDALE,
Circuit Judges.

Appendix C

PER CURIAM:*

•Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published

(continued...)

Willie Pratt and Bernard Garrett appeal a judgment, following a bench trial, in which the district court, after a remand by this court,

(...continued)

and is not precedent except under the limited Circumstances set forth in *5th CIR.* R. 475.4.

found no racial discrimination by the defendant employer, the City of Houston. We have reviewed the briefs and applicable authorities and pertinent portions of the record and have heard the arguments of counsel. We conclude that the district court was correct in its decision and, in any event, did not commit clear error under **FED.** R. CIV. P. 52.

The judgment is AFFIRMED.

Appendix D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-20354

WILLIE E. PRATT; BERNARD GARRETT
Plaintiff - Appellants

V.

CITY OF HOUSTON TEXAS
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 4/15/03, 5 Cir., _____, _____F. 3d _____)

Before SMITH, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

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(box marked) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, *the* Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled a~ the request of one of the members of the court-- and a majority of the judges who are- in regular active - service not having voted in favor (FED.R.APP.P. and 5THCIR.R. 35). the Petition for Rehearing En Banc is DENIED.

Appendix D

Signature of R. Barksdale

_____

United States Circuit Judge

REHG-6a

CLERK'S NOTES:

SEE FRAP AND LOCAL RULES

41 FOR STAY OF THE

MANDATE.

Appendix E

STATEMENT REGARDING ORAL ARGUMENT

In a previous appeal of this case, the court reversed summary judgment for the City of Houston. On remand, trial of the allegations of employment discrimination was to the court. Appellants believe that oral argument will assist this court in review of the record to confirm that findings of the court on material facts clearly were erroneous.

Appendix E

STATEMENT OF JURISDICTION

Notice of appeal having been timely filed after the entry of judgment below, this court has jurisdiction under the provisions of 28 U.S.C. § 1291, relating to final decisions of district courts.

Appendix E

STATEMENT OF THE ISSUES

1. In a prior appeal of this case, this court held that the evidence (at summary judgment) created significant fact issues with regard to the City's motivation for not promoting the employees, including the better resumes of the employees, the special treatment accorded a White applicant, and prior discrimination by City officials in favor of White applicants. Did the trial court err in failing to address these issues in its findings and conclusions?

A. If so, is a new trial required?

B. If a new trial is not required, must judgment still be reversed and remanded for entry of findings of fact in conformance with Rule *52(a),* Fed.R.Civ.P.?

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2. The trial court found that the City's failure to refer Mr. Pratt for consideration was questionable, but did not consider whether such failure was a pretext for discrimination. Was the trial court's conclusion that race was not a factor in Mr. Pratt's not being considered clearly erroneous?

3. In the prior appeal of this case, this court considered the controverting assertions respecting Mr. Garrett's alleged refusal to take a skills test. Was the trial court's conclusion, which does not address the assertions, clearly erroneous?

Appendix E

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

A. References to the Record

Plaintiffs-Appellants Pratt and Garrett are referred to collectively as employees, or when individual reference is appropriate, by their surname. References to the City of Houston, Texas defendant-appellee, are as "the City." The Department of Public Works and Engineering is referred to as "Public Works." References to pleadings and submissions of record are either to the Record Excerpts, as Exc., followed by the corresponding tab number, and, if necessary, the page within the tabbed section. Or, otherwise, the reference is to the Record on Appeal, as Rec., followed by the docket number of the document, a

hyphen, then the page or pages to which reference is made. References to the trial transcript are to Tr., followed by the volume number in Roman format, then the page or pages in Arabic numerals.

B. Proceedings **in the Trial Court**

Alleging racial discrimination in their not being promoted to a Senior Inspector position in the Department of Public Works and Engineering, the employees sued on October 28, 1998, asserting claims under the Civil Rights Acts of 1866, 1871, and 1964, as amended.

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Summary judgment was granted on November 12, 1999. Rec. 44. This court reversed and remanded. Rec. 48.

The employees waived jury trial, Rec. 61, 62.

After a four-day trial, the court found in favor of the City, Rec. *85,* and entered final judgment on March *5,* 2002, Rec. 86. A timely notice of appeal was filed on March 22, 2002, Rec. 88.

Statement of Facts

In its opinion reversing summary judgment on a finding that there was sufficient evidence to infer that race was a factor in the City's failure to promote either Pratt or Garrett, Rec. 49, this court summarized the facts as follows. (The opinion is included in the excerpts as Exc. *5.)*

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"In 1997, Willie Pratt and Bernard Garrett, both black men, were community service inspectors for the City of Houston's Department of Public Works and Engineering ("DWPE"). In July of 1997, DPWE posted a job opening for a senior inspector. The posting listed the position's minimum qualifications as (1) an associate's degree or certification/licensing in a technical specialty program of between 18 months and three years' duration; (2) four years of experience investigating or inspecting criminal environmental pollution; (3) a valid Texas driver's license and compliance with the City's policy on

driving. The posting also listed a preference for experience in criminal case development and environmental investigations. Under 'Selections/Skills Tests Required,' the posting stated 'none.'

"Tom Collins, the chief inspector of the Neighborhood Protection Division of DWPE, supervised both Pratt and Garrett, and was responsible for selecting the new senior inspector. Most of the plaintiffs' claims of discrimination center on the allegation that Collins preferred white candidates and that he had decided to hire the white male who was eventually awarded the position before the hiring process even began. Pratt and Garrett point to Collins's attempt to lower the minimum qualifications for the senior

inspector position before the opening was posted. Although there is no evidence indicating what qualifications Collins tried to change, the plaintiffs assert that Collins was attempting to make a white candidate eligible for the position. The position's requirements were not changed, however, as the basic qualifications were standard city-wide and Collins had no authority to change them.

"Pratt and Garrett both applied for the senior inspector position. Their qualifications exceeded the minimum requirements for the position. Pratt had a B.S. degree and a year of graduate school, two and a half years of experience as a pollution investigator for the Coast

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Guard, and had been a DPWE community service inspector for the prior two years. Garrett had a Master's degree and a Ph.D. (pending submission of his dissertation) in environmental engineering, and had spent the previous four years as a community service inspector at DPWE.

"In total, 24 people –12 blacks, 7 whites, 2 Hispanics and 2 Pacific Islanders – applied for the senior inspector position. A human resources specialist, Sally Layman, screened the applications for minimum requirements, and forwarded 15 of them to Collins at DPWE, to conduct the primary interviewing. Of the 15 forwarded applications, 8 applicants were black, 4 were white, 2 were Hispanic,

and 1 was a Pacific Islander. "Garrett's application was forwarded; Pratt's application was not. Layman contends that she did not forward Pratt's application because she did not know the subject are of Pratt's degree. Pratt contends that he attached his resume with his application, and that Layman knew he had a degree and knew that he was an employee of the department. After Pratt became aware that he had not been referred, he called the human resources department and orally provided the information. At that point, however, the application period had closed. Pratt also states that he informed Collins of his application and credentials.

Collins did not inquire into the status of Pratt's

application. The application of another black candidate, Marion Gale, also was not initially forwarded. Gale inquired personally about the status of his application, which was then forwarded to Collins. Although Collins says that he checked on Gale's application, that point is disputed.

"The application of Edward Rutland, the individual who was eventually awarded the position, also was not forwarded. Rutland had completed 12 hours of college in addition to his high school diploma, had graduated from the Houston Police Academy, had 40 hours of EPA hazardous waste operations training and had spent two of his 12 years as a Houston police

officer in a 'Rat on a Rat' program enforcing environmental laws. Rutland had been out of the police force for two years when he applied for the senior inspector position; he had not engaged in related work during that period. Neither was it clear that Rutland's educational background and his work experience met the minimum qualifications listed for the position.

"When Layman failed to forward Rutland's application, several city employees, including Collins and Beatrice Link, Collins's supervisor, made inquiries on Rutland's behalf. The human resources department reviewed Rutland's application again and determined that the combination of the 40 hour course

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and Rutland's experience as a police officer satisfied the education and experience requirements. Layman therefore forwarded Rutland's application to the second stage.

"After Layman referred the applications, Collins conducted preliminary interviews with the candidates. Collins administered a computer skills exam testing grammar, knowledge of environmental laws, and Microsoft Word skills to all the interviewees. Collins did not give applicants official notice that the computer test would be part of the selection process.

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"Garrett interviewed for the Senior Inspector position. Many of the facts concerning the interview are in dispute. Collins asserts that Garrett was late for the interview. When Garrett arrived, Collins was not in his office; he was speaking to a colleague in the next door office. According to Garrett, Collins saw him, but ignored him. While waiting for his interview, Garrett went to the drinking fountain, approximately 15 feet away. In the meantime, believing that Garrett had left the building, Collins had Garrett paged. Garrett appeared at Collins's door immediately after the page. Collins then requested that Garrett complete the skills test. Garrett protested that a skills test had not been listed on the posting. Collins claims that

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Garrett then became angry and stormed out; Garrett contends that Collins became irate and began yelling at him, and that he left without taking the test to defuse the situation.

"Collins referred three candidates, including Gale, for final interviews with a three person panel. Garrett was not a finalist. The panel, of which Collins was a member, recommended Rutland to Link. Link considered the recommendation, and then recommended Rutland to the personnel department.

"The plaintiffs argue that there is other evidence that Collins attempted to manipulate the hiring process to favor white candidates. Previously, Collins had canceled another senior inspector posting after

looking at a list of qualified candidates on which, the plaintiffs contend, all individuals, including Garrett, were black. Garrett and Pratt assert that Collins canceled the posting after Human Resources refused to refer an under-qualified white candidate whom Collins preferred."

Material facts, as shown by the evidence at trial, are discussed as part of the argument below.

SUMMARY OF THE ARGUMENT

1. The Court Failed to Address Material Issues of Fact

A. Standard of Review

In *a* case alleging racial discrimination, the court's analysis is governed by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). If on a bench trial the court fails to consider the ultimate issues of pretext and motivation, its judgment must be reversed. *Corley v. Jackson Police Dept., 566* F.2d 994, 1001 *(5th* Cir. 1978). Rule 5 2(a), Fed.R.Civ.P., proscribes conclusory findings which fail to clearly reflect a choice between conflicting testimony. *Redditt v. Mississippi Extended Care Centers, Inc.,* 718 F.2d 1381, 1386 (5th Cir. 1983).

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B.

The Court's Findings Are Conclusory and Insufficient

As the trial court did in *Corley* and *Redditt,* the district court in this case credited the City's assertions, and even when an assertion was considered questionable, then proceeded to conclude that the actions of the City officials concerned were not affected by the employees' race. See, Findings of Fact and Conclusions of Law (hereinafter "Findings"), Exc. Tab 4, findings nos. 8, 9,16, 20 and 21.

As this court found in the prior appeal of this case, *Pratt v. City of Houston,* 247 F. 3d 601 (5th Cir.

2001), both employees in this case established a prima facie case, Exc. Tab 5 at 9, and reached the pretext stage, *Id.* at 8. This court found that the evidence, even at the summary judgment stage, created a question of fact respecting the City's motivation. *Id.* at 10. Even with the benefit of this court's analysis, the trial court stopped at the second step of *McDonnell Douglas* and found the articulation of a non-discriminatory motive sufficient to enter judgment for the City.

Under clearly established principles in this court, the judgment must be reversed.

C. Remand for a New Trial Is Required

Where each party offers substantially divergent factual accounts requiring difficult credibility choices

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on material subsidiary facts, findings not in conformance with Rule *52(a)* are so tainted that a limited remand only for entry of additional findings would serve no useful purpose. *Corley, supra, 566* F.2d at 100 1-02.

Here Mr. Pratt's application was not considered, even though he was already engaged in the activities required by the position at issue and had impressive experience both within the City and in the military service. Mr. Garrett offered evidence that he did not refuse to take the skill test, even though it was required contrary to established policy and practice, but that he was ignored by the supervisor.

Ignoring the employees' evidence and **unquestioningly**

accepting the City's version would make the federal courts complicit in the allegedly racially discriminatory practices at issue in this case.

Remand for a new trial is required.

D. Alternatively, the Court Must Remand for Additional Findings

Subject to the challenges of the findings as clearly erroneous, *infra,* if this court does not require a new trial, remand still is necessary for the entry of appropriate findings. See, *Armstrong v. Collier, 536* F.2d 72, 77 (5th Cir. 1976)

2. **Failure to Find Racial Discrimination Was Clearly Erroneous**

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A. Standard of Review

The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo. *Kona Technology Corp. v. Southern Pacaic Transp. Co.,* 225 F.3d *595,* 601 (5th Cir. 2000). Mixed issues of fact and law are reviewed by combining the two standards to review factual components for clear error and legal components de novo. *Bannistor v. Ullman,* 287 F.3d 394, 401 (5th Cir. 2002).

Legal conclusions are subject to plenary review and are not entitled to such deference. *Id.,* citing *Reich v. Lancaster,* 55 F.3d 1034, 1044 (5th Cir.1995).

B. The Merits Need Not Be Reached

As shown above, this case must be remanded for a new trial. Accordingly, the merits of the employees' racial discrimination claims need not be reached. Although the employees are confident that the court must remand because of the inadequacy of the findings entered by the court, the merits of the individual claims are addressed in the alternative. Because of the lack of detail in the findings, however, the arguments presented are not as detailed as they would be if the court had properly addressed the issues.

C. Mr. Pratt Discriminatorily Was Denied Consideration

The very finding by the court that the reason for not forwarding Mr. Pratt's application for consideration

is questionable renders the subsequent, and unexplained, finding of no racial motivation clearly erroneous.

The evidence showed that Mr. Pratt not only exceeded the educational requirements of the posted position, but he had considerable experience with the City of Houston and the United States Coast Guard that was directly applicable to the duties of the higher position he sought. The failure to forward the application indeed was more than questionable. It was egregiously wrong. Even then, the evidence showed that in the case of the White applicant eventually selected, the City supervisor with a prior record of racial prejudice affirmatively acted to

insure that the White applicant was given consideration. Had the court considered the totality of the evidence, as it should have, a finding that Mr. Pratt was subjected to racial discrimination was inescapable.

D. Mr. Garret Discriminatorily Was Denied Consideration

Mr. Garrett also demonstrated superior qualifications for the position in question. The court found that Mr. Garrett removed himself from consideration by walking out of the supervisor's office after the supervisor had stated to Mr. Garrett that Mr. Garrett would have to take an unannounced skills test. The evidence demonstrated that Mr.

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Garrett had previously not been considered because an announcement of the same position previously was withdrawn. There was uncontroverted evidence that the position announcement specifically stated no test would be required. Mr. Garrett testified that he was ignored when he first approached the supervisor's office to be interviewed, and that thereafter he was treated with such hostility that he found it necessary to leave the office in order to avoid a confrontation with his immediate supervisor. Had the court considered all of the evidence, a finding of racial discrimination was unavoidable, and the finding of no invidious motivation was clearly erroneous.

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ARGUMENT AND AUTHORITIES

1.

Insufficiency of Findings Requires Reversal and Remand

The ultimate test on the adequacy of a trial court's findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for the court's decision. *Gulf King Shrimp Co. v. Wirtz,* 407 F.2d *508, 515* (5th Cir. 1969), quoting *Carr v. Yokohama Specie Bank, Ltd.,* 200 F.2d 251, *255* (9th Cir. 1952).

That test was specifically applied to a Title VII employment discrimination case in *Corley, supra.* As shown in the summary of the argument above,

the court must address the determinative step as set forth in cases following *McDonnell Douglas, supra.* Specifically, the court cannot stop its analysis by crediting, without more, the employer's assertedly non-discriminatory reason for its actions. Where an employee presents credible evidence to show that the employer's reason is not true and is a pretext for an unlawfully discriminatory motivation, that evidence must be addressed by the trial court.

That is not to say that the court's findings must address all of the evidence presented, or make findings on the negative of each issue, but where there is a conflict in the evidence, the trial court has a duty to appraise all facts adduced and choose

between two permissible and conflicting views.

Carr, supra, 200 F.2d at *255.*

In the prior appeal of this case, this court correctly found that the evidence reached the pretext stage. As shown, this court specifically directed attention to significant material issues. A comparison of this court's and the trial court's addressing of the issues plainly is dispositive of reversible error.

(This court – 5th Cir.)

"Layman contends that she did not forward Pratt's application because she did not know the subject area of Pratt's degree. Pratt contends that he attached his resume with his application, and that Layman knew he had a degree and knew that he was an employee of the department." Exc. Tab *5,* at 3-4.

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"Pratt and Garrett both applied for the senior inspector position. Their qualifications exceeded the minimum requirements for the position." *Id.,* at 3.

"When Layman failed to forward [White applicant] Rutland's application, several city employees, including Collins [the immediate supervisor] and Beatrice Link, Collins' supervisor [and the official making the selection], made inquiries on Rutland's behalf." *Id.,* at *5.*

(Trial Court – District Court)

"Pratt's application was not referred.. .because Sally Layman.. .determined that Pratt did not meet the

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minimum educational qualifications for the position. Layman, a white female, could not determine Pratt's degree discipline from his application, and without a stated discipline she could not determine Pratt's qualifications... .Although Layman's decision not to refer Pratt's application.. .appears to be questionable since the Job Posting.. .did not require a degree in a particular discipline, Layman's decision was not affected by Pratt's race." Exc. Tab 4, at

2-3.

(This Court – 5th Court)

"Collins administered a computer skills exam testing grammar, knowledge of environmental laws, and Microsoft Word skills to all interviewees. Collins did not give applicants official notice that the

computer test would be part of the selection process." *Id.*, at *5*.

"Garrett protested that a skills test had not been listed on the posting. Collins claims that Garrett then became angry and stormed out; Garrett contends that Collins became irate and began yelling at him, and that he left without taking the test to defuse the situation." *Id.*, at 6.

(Trial Court - District Court)

"Like all other applicants, Collins told Garrett that he was to complete a computer assessment exercise. Garrett refused to perform the computer assessment exercise and walked out of Collins' office. The computer assessment exercise bore a direct and reasonable relationship to the type of work required

and expected to be performed by a senior inspector. Collins' request that all applicants perform the computer assessment exercise did not violate any established policy, rule or regulation of the City of Houston, and had nothing to do with the race of the applicants. Garrett, by his actions in not taking the computer assessment exercise and walking out of Collins' office, removed himself from the selection process for the Senior Inspector position." *Id.*, at *4-5.*

(This Court – 5th Cir.)

"This evidence creates significant fact issues with regard to the City's motivation for not promoting the plaintiffs. Given these facts, the better resumes of the plaintiffs, the special treatment Rutland received,

and the allegations that Collins discriminated in favor of white applicants on other occasions, a jury could reasonably infer that the hiring process was manipulated, and that it was preordained that the white candidate would be awarded the position over demonstrably better qualified blacks." *Id.*, at 9-10.

(Trial Court – District Court)

"In this case the court concludes, based on the findings of fact stated above, that neither plaintiff has shown that the City's failure to promote him to the Senior Inspector position, the failure to approve Pratt as qualified for the position, or the requirement that Garrett take a computer assessment exercise, was motivated by the race of Garrett or Pratt." *Id.*, at 6-7.

On remand, the employees waived trial to a jury. The unfortunate result was a repetition of the same errors which led to reversal of the district court's granting of summary judgment.

The trial court apparently gave some weight to the fact that some of the individuals involved in the selection process are African-American. The Supreme Court has specifically rejected the presumption that individuals will not unlawfully discriminate against others of their own race. *Oncale v. Sundowner Offshore Services, Inc., 523* U.S. 75,78(1998), citing *Castañeda v. Partida,* 430 U.S. 482,499 (1977)("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their

group.")

The district court provides absolutely no indication that it gave even the slightest consideration to the evidence of the plaintiffs at trial, just as the court had failed to accord any significance to that evidence at the summary judgment stage.

Accordingly, the findings made by the court are insufficient, and they constitute a clearly prejudicial and reversible error of law.

For the reasons previously discussed, remand for a new trial is required. The court should give some consideration to the likelihood that upon remand for new trial, the employees will renew their request for a

jury.

2.
Finding No Discrimination With Respect to Mr. Pratt Was Clear Error

As stated above, the court need not reach the merits of Mr. Pratt's claim, since remand for a new trial is required.

This court found in the prior appeal that Mr. Pratt was well qualified for the position sought, and, in fact, better qualified than the individual who was selected.

The determinative issue before the court, then, was whether it was true that Mr. Pratt was not found qualified because Ms. Layman, an employee in human resources, did not know the discipline in which Mr. Pratt's bachelor's degree was granted.

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Ms. Layman testified, however, that the education required in the job posting was either an associate's degree or a technical specialty program lasting at least 18 months. Tr. 1-41; Exc. Tab 5, at 2. An associate degree is a two-year academic degree, generally awarded for general liberal arts studies. Ms. Layman testified that the application did not have any question regarding the field in which a degree was granted. Tr. 1-49. She testified that while the application that Mr. Pratt was required to submit did not ask for the field of study, other applications for positions in the City do ask for that information. Tr *1-50.* The testimony certainly can be credited, since associate degrees are not awarded for specific

academic disciplines.

Accordingly, it was plainly demonstrated that the reason asserted for Mr. Pratt's not having been considered was not true. Combined with the prima facie showing, and the other circumstantial evidence to which this court made reference in the prior appeal, there was ample evidence for a finding of unlawful discrimination. *Reeves v. Sanderson Plumbing Products, 530* U.S. 133, 148 (2000). As this court noted in its opinion, there was evidence of special treatment of the White candidate who was selected for the position. Exc., Tab *5* at 10.

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3.

Finding No Discrimination With Respect to Mr. Garrett Was Clear Error

Similarly, the court need not reach the merits of Mr. Garrett's claims, since remand for a new trial is required.

However, it is also plain that the district court was clearly erroneous in not finding that Mr. Garrett was denied consideration because of his race.

Mr. Garrett had even more impressive educational qualifications, a doctor's degree pending submission of his dissertation.

The City asserted, and the district court found, that Mr. Garrett disqualified himself because he refused to take a test required for the position.

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As this court noted, there is controverting evidence about whether Mr. Garrett refused to take the test, or whether Mr. Collins caused Mr. Garrett to leave in order to avoid an unpleasant confrontation with his immediate supervisor. The district court could, and should have, found in Mr. Garrett's favor even without making a credibility determination.

Ms. Layman, the human resources representative, testified in examination by the City's attorney, that there was no examination administered for the position, that no examination was required, and that the department could not administer a civil service examination.

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The City apparently contended that the skills test which Mr. Collins sought to administer to Mr. Garrett and other applicants was not a civil service examination, and thus is could be administered at the department's option.

However, as Ms. Layman also testified, the job posting was very specific in this regard. It stated, "Selection/skills test required: none." Tr. I-62, referring to the job announcement, trial exhibit *15.* Thus, the evidence elicited by the City itself not only demonstrates that the court's finding was clearly erroneous, Exe. Tab 4, at *5,* finding 16, but together with the prima facie case, which this court established as the law of the case, and the additional

circumstantial evidence, was sufficient to establish unlawful motivation with respect to Mr. Garrett. For this additional reason, the trial court's judgment must be reversed.

PRAYER FOR RELIEF

Because the findings of the trial court do not comply with Rule *52(a),* Fed.R.Civ.P., and there was substantial controversy in the evidence presented, the judgment below must be reversed and a new trial ordered. The employees respectfully request that in its order of remand the court include leave for them to reinstate their request for a jury trial. Even if the court were to find that the findings comply with Rule 5 2(a), reversal and remand for

trial is required because the findings of the trial court were clearly erroneous with respect to both employees. Further in the alternative, the judgment must be reversed and the case remanded for entry of findings of fact which comply with the rule.

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Appendix F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Appeal

No. 02-20354

WILLIE E. PRATT; BERNARD GARRETT,

Plaintiffs-Appellants,

v.

CITY OF HOUSTON, TEXAS

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

APPELLANTS' PETITION FOR REHEARING **EN BANC**

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Appendix F

STATEMENT OF THE ISSUE

For a job that had posted requirements of an associate degree or technical certification and four years of related experience, two African-American applicants—one with a bachelor's degree and one year graduate education; the other, with a doctor's degree pending submission of a dissertation—were not selected. A white applicant with no degree, whose educational background and experience did not appear to meet the minimum qualifications, was chosen. Summary judgment for the employer was reversed by this court in Pratt v. City of Houston, 247 F.3d 601 (5th Cir. 2001), attached as Appendix 1. In a bench trial on remand, the court credited the employer's evidence with respect to matters this court had held raised pretext. Without

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addressing the contrary evidence presented by the employees, the court concluded that the employer's actions were not affected by the applicants' race and entered judgment against the employees. In a one paragraph opinion, attached as Appendix 2, which also did not address the employees' evidence, the panel concluded that the district court was correct. The issue, thus, is:

May a panel of this court issue an opinion directly contrary to well established precedent of this court, timely brought to the panel's attention, by simply ignoring the argument and excluding it from its opinion?

Appendix F

STATEMENT OF PROCEEDINGS AND DISPOSITION OF THE CASE

As shown in the statement of the issue, the African-American appellants filed a suit alleging racial discrimination after a White applicant with clearly inferior qualifications was selected over them for promotion.' Summary judgment was granted the employer, and, on appeal, this court reversed, specifically finding and specifying unresolved evidence of pretext. On remand, evidence consistent with that considered in the summary judgment was presented in a bench trial, at the conclusion of which the court entered findings and conclusions and judgment for the employer. The employees again appealed, complaining that the trial court did not address their evidence or the determinative issue of pretext,

citing Corley and Redditt, supra. In the opinion which is the subject of this petition, the panel did not address the issue presented, nor the evidence a previous panel found sufficient to raise the ultimate issue of pretext, and simply concluded that there was no clear error below under Rule 52, Fed.R.Civ.P.

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1 Where the job requires an associate degree, which the successful White applicant did not have, and an African-American completing his dissertation for a doctor's degree was rejected, it is respectfully suggested that the comparison jumps off the page and strikes one on the face. See Deines v. Texas Dept. of Protective and Regulatory Services, 164 F.3d 277 (5th Cir. 1999).

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STATEMENT OF FACTS

As they did in their opening brief, the employees rely on the facts as ably summarized by Circuit Judge Jolly in Pratt I, Appendix 1. While in its brief the employer asserted that the facts shown by the evidence at trial varied from those in the summary judgment evidence, Appellee's Brief at 3, no specific variance was shown. In any event, other than to the extent that there was sufficient, controverted evidence to raise the ultimate issue of pretext, the facts are not dispositive of the issue of law presented in this appeal. The facts as recited in the employer's brief, while couched in language favorable to the employer, equally support the argument in this petition.

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ARGUMENT AND AUTHORITIES

Where issues are presented by controverted evidence, it is not the function of this court to make credibility determinations. Corley, supra, 566 F.2d at 1000.

Here is how Circuit Judge Emilio Garza characterized the holding in Pratt I:

In Pratt, two unsuccessful candidates brought claims of racial discrimination after failing to receive a promotion, 247 F.3d at 605. We held that the plaintiffs had made a sufficient showing of pretext, in light of the evidence showing that the plaintiffs were obstructed in their efforts to complete the hiring process, the plaintiffs' qualifications were superior, the successful candidate was given special treatment, and the supervisor had allegedly discriminated on previous occasions. Id. at

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607.

Price v. Federal Express Corp., 283 F.3d 715, 724 (5th Cir. 2002).

Nothing is contained in the trial court's findings of fact that addresses the employees' evidence as characterized by Circuit Judges Jolly and Garza. Ignoring evidence that a racist supervisor angrily confronted and yelled at Appellant Garrett, forcing Garrett to leave the room to defuse the situation, Pratt I, 247 F.3d at 605, see Appendix 1, the trial court found that Mr. Garrett, "by his actions in not taking the computer assessment exercise and walking out of Collins' office, removed himself from the selection process for the Senior Inspector position." Finding of Fact 17, Rec. Exc. Tab 4 at 5. It was not controverted that the job requirements

posted did not require any computer assessment or other skill test.

Appellant Pratt was not even considered for the promotion because his application was not forwarded for consideration.

The trial court dealt with Mr. Pratt's having been "obstructed," in Judge Garza' s characterization by finding: "Although Layman's decision not to refer Pratt's application to the Public Works Department appears to be questionable since the Job Posting for PN #62388 did not require a degree in a particular discipline, Layman's decision was not affected by Pratt's race." Id., Finding of Fact 8. It was not controverted that the stated requirement was an associate degree, no

discipline specified, and that Mr. Pratt had a bachelor's degree and one year of post-graduate education.

The circumstances in this case are more indicative of racial prejudice than those in Corley, where the evidence showed that African-American police officers who were discharged for taking a bribe had indeed taken a bribe, but pretext was not addressed, even though the evidence showed White applicants also had taken bribes.

The employer's own brief starkly demonstrates the trial court's error. "The trial record clearly supports the notion that the trial court heard, considered, and ultimately decided the issue of pretext as evidenced by its findings that none of the City's articulated reasons for the challenged decisions were motivated or affected by

the race of the Appellants/applicants." Appellee's Brief at 10.

It is not for this court to review the record and determine that the result would have been the same, had the trial court properly followed the rules. In Corley, 566 F.2d at 999 fri. 8, this court quoted favorably from Carter v. Cambell, 264 F.2d 930, 941 (5th Cir. 1959), stating that both parties "are entitled to a trial of the hotly contested inferences by a court consciously applying the correct legal standards. They will not have had such a trial merely by our undertaking to say that had the standard been applied, the evidence would have warranted the result."

In *Corley*, this court noted that the trial judge had

indicated an insufficient appreciation of the applicability of the *McDonnell Douglas* paradigm.[2]

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[2] *McDonnellDouglas v. Green*, 411 U.S. 792, 800-802 (1973). In *Corley*, this court noted that the trial judge had indicated an insufficient appreciation of the credit that evidence against contrary evidence offered by the other party. *Id.* On appeal, this court cannot determine whether the underlying findings were clearly erroneous if the bases for the trial court's findings are not expressed with sufficient particularity. *Id.*

The panel's opinion, like the trial court's findings, does

no more than state that the trial court was correct in its finding of no discrimination. Reviewing the findings below, and the short opinion on appeal, one still is left to speculate and wonder why a White non-degreed individual with lesser experience was chosen over African-Americans with post-graduate education doing precisely the work involved in the promotional opportunity at issue.

This court can allow the panel decision to stand because in its judgment sufficient time and consideration has been dedicated to the complaints of two municipal employees frustrated by lack of advancement. Or this court can consider the time required to engage in future credibility determinations, choose to act on principle and confirm

that one can rely on the court's precedents.

The disposition of the appeal—whether remand for trial to the same or a different judge should be ordered, or whether remand for entry of more detailed findings is sufficient—can and should be addressed as part of the reconsideration by this court En Banc

CONCLUSION

The decision below, and the panel's opinion, violate the requirements of Rule *52,* Fed.R.Civ.P., and this principles established in this court by the opinions in *Corley* and *Redditt.* Accordingly, rehearing en banc is required to secure and maintain uniformity of this court's decisions.

Respectfully submitted,

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